BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: LAURA B., Claimant, vs. FRANK D. LANTERMAN REGIONAL CENTER, Service Agency.	Case No. L2004090480

AMENDED DECISION

This matter was heard by Humberto Flores, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on June 30, 2005, and on April 6 and 7, 2006.

Laura B. (claimant) was represented by her parents, Richard and Veronique B.[1] Frank D. Lanterman Regional Center (FDLRC) was represented by Pat Huth, Attorney at Law.

Oral and documentary evidence was received and the matter was submitted for decision. The original decision dated May 1, 2006, has a clerical error in footnote 2, in that it incorrectly states that Case No. L2006090480 was continued at the request of both parties. In fact, the continued matter should be referenced as Case No. L2006090478. Pursuant to Government Code section 11518.5, footnote 2 shall be amended to reflect the correct case number.

ISSUE PRESENTED

Did the Service Agency properly reduce funding for nursing care provided to claimant from registered nurse (RN) level of care to a licensed vocational nurse (LVN) level of care?[2]

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[1] Claimant's surname, and that of her family members, is omitted throughout this decision to protect their privacy.

[2] Pursuant to a stipulation by the parties, Case No. L2006090478 was continued as the parties were not prepared to litigate the issue presented in that case. The parties were directed to request another hearing date for that matter.

FACTUAL FINDINGS

1. Laura B. is a seven year-old girl who has been diagnosed with microcephaly with developmental delay, seizure disorder, and other significant health impairments, including pulmonary atresia, ventricular spetal defect (VSD) and Tetralogy of Fallot.[3] Claimant was deemed eligible for regional center services based on her developmental disabilities pursuant to the Lanterman Developmental Disabilities Services Act (the Lanterman Act), California Welfare and Institutions Code, section 4500 *et seq*.[4]

2. Claimant had cardiac surgery in June 1999, and thereafter failed to thrive, so a G-tube was placed in October 1999. Claimant developed apneic siezures for which she was given anticonvulsants. She was released from the hospital in November 1999. At home claimant was under 24 hour care of an RN. She was placed on an apnea monitor and pulse oximter, and oxygen was available PRN (as needed). In 2000 and 2001, claimant had a number of apnea seizures and three episodes of pneumonia. Claimant had a second cardiac surgery in March 2001.

3. Initially, claimant received 24 hour RN care per day at home. FDLRC funded ten hours of RN care per day and another agency of the State of California (Medi-Cal – under the EPSTD program) funded 14 hours of RN care per day. Claimant's oxygen saturation is been monitored and oxygen is available when needed. Claimant continues to be fed and hydrated through a G-Tube. Claimant is given oxygen when the pulse oximeter registers less than 75. During exertion, claimant's oxygen level may fall to the upper 70s. If this occurs, oxygen is administered. Claimant remains dependent on her apnea monitor, respiratory treatment and suctioning, and G-Tube feedings. Claimant is given oxygen when needed.

4. In August 2002, claimant was assessed by Anita Arcilla Gutierrez, RN. She did not make a recommendation in her report as she was awaiting updated reports from claimant's pediatrician, and other members of claimant's health care team.

5. At some point in 2004, the EPSTD program that funded part of the RN care for claimant gave notice that it intended to reduce the level of care from RN to LVN. After an administrative hearing, an Administrative Law Judge from the Department of Social Services determined that it was appropriate to reduce the level of nursing care from RN to LVN. Claimant's parents appealed the decision but were unclear in their testimony regarding the status of the appeal.

6. Despite the above referenced decision, the registered nurses that provided care for claimant continued to provide care at the reduced LVN rate.

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[3] Tetralogy of Fallot is a chronic condition that consists of a large ventricular septal defect (VSD – a hole in the wall separating the left from the right ventricles) and pulmonary stenosis (obstructed blood flows to the lungs). The pulmonary arteries may be small as well, which may cause the child to be cyanotic (bluish color on the lips, nail beds and skin). This cyanotic state is caused by blood that is low in oxygen. Less than normal amounts of blood go to the lungs because of the obstruction from the pulmonary stenosis and the smaller size of the pulmonary artery.

[4] All statutory references are to the Welfare and Institutions Code unless otherwise noted.

7. On August 18, 2004, FDLRC informed claimant's parents of its decision to reduce the level of nursing care from RN to LVN. On August 20, 2004, claimant's mother filed a fair hearing request.

8. On September 8, 2004, FDLRC held an informal meeting with claimant's parents. On September 10, 2004, Marc Baca, FDLRC Appeals Coordinator, upheld the decision of FDLRC reducing the level of nursing care for claimant.

9. Claimant's Home Health Certification Plan of Care (POC) during 2005 and 2006, directs an RN to conduct a monthly "assessment/case management." The POC also provides for 45 hours per week of skilled LVN nursing care funded by EPSTD. In addition, FDLRC funds 10 hours a day of RN care and 53 hours a week of LVN skilled nursing. The specific orders include, inter alia, total system assessment including vital signs, cardiovascular, cardiopulmonary, gastrointestinal status, and skin integrity; administration of medications and to assess adverse reactions to the medications; nebulizer treatments PRN (as needed); pulse oximeter PRN while awake and continuously while asleep; maintain adequate nutrition via G-Tube and oral feeding as tolerated; keep oxygen saturation above 75%; patient never to be left unattended due to apnea episodes; if apnea occurs, administer oxygen immediately, and if no response to [oxygen] treatment call 911 and start CPR; the skilled nurse may administer oxygen via nasal cannula to keep oxygen saturation level above 75%; skilled nurse to record urine and bowel and assess for signs of fluid overload or dehydration, and to maintain patency and placement of G-Tube. Finally, the POC provides that trained patient care givers are deemed safe to assume care, including treatments and medication administration for claimant when agency nurses are unavailable.

10. On April 20, 2005, claimant was assessed by Ardis Adrian, RN. Ms. Adrian stated in her report that LVNs routinely administer oxygen, and perform apnea monitoring, pulse oxymeter monitoring, suctioning, medication administration including respiratory treatments, and gastric tube feedings. At the time of the assessment, claimant had not had a seizure in 1½ years. Based Ms. Adrian's review of the LVN scope of practice, as determined by the California Nurses Association, Ms. Adrian recommended that claimant receive an LVN level of care unless contraindicated by claimant's primary physician.

11. Anita Gutierrez, RN, an expert witness, testified that an LVN performs his/her duties under the treating physician's treatment plan. Ms. Gutierrez stated that she reviewed the available RN charts, treatment plans, and other medical records. Ms. Gutierrez's testimony established that an LVN is authorized to perform all of the treatments set forth in the Home Health Care and Plans of Care in exhibit 6. An LVN is authorized to, inter alia: (1) administer all of the medications in the treatment plan; (2) administer oxygen to claimant when necessary to keep oxygen saturation above 75%; (3) read a pulse oximeter to determine oxygen saturation level; (4) read an apnea monitor; (5) suction after each nebulizer treatment; and (6) to feed claimant through G-Tube. Further, an LVN is authorized to perform CPR.

12. In preparation for her testimony, Nurse Gutierrez reviewed the nursing notes kept by the RNs from Alternative Home Care, the agency that provides claimant's skilled nursing care. Nurse Gutierrez noted only 9 documented instances where claimant's oxygen saturation fell below 75%. Further, FDLRC submitted supervisory nursing records and 60 day summaries from Alternative Home Care, which indicate that claimant's condition has been clinically stable over the past year.

13. Leslie Richard, M.D., also testified as an expert witness for FDLRC. Dr. Richard testified that claimant suffers from conditions that are chronic and will not change unless there is some surgical or other corrective medical intervention. A health professional can only treat the symptoms when there is no plan for corrective medical intervention. Dr. Richard did not minimize claimant's medical conditions. In fact, she noted that claimant's conditions are indeed serious. However, claimant's symptoms have been relatively stable for the past three years. Based on Dr. Richard's review of the medical records, she noted that claimant has not suffered a seizure in three years. Dr. Richard supported Ms. Gutierrez's testimony that an LVN is authorized to perform all of the treatments and to administer all of the medications set forth in the treatment plans. In fact, Dr. Richard opined that, although claimant suffers from very serious conditions, the treatment and medication plans are not complex. Claimant is not on a difficult medication regimen. There are no orders for any injections or IV fluids. Claimant is not on a ventilator, nor does she have a tracheostomy.

14. An LVN is not qualified to perform an intubation[5] on a person who is suffering from respiratory distress. In fact, registered nurses are not qualified to perform intubations unless they have an Advanced Cardiac Life Support (ACLS) certification. Dr. Richards and Nurse Gutierrez both testified that 24 hour care with a 1-to-1 ratio by an RN with an ACLS certification is generally reserved for patients in intensive care units. These are patients who are on complicated medication regimens, who require complicated assessments, and who are in constant danger of requiring an endotracheal intubation.

15. Claimant's expert, Nicolas Lellouche, M.D., is a cardiologist trained in France. He is currently a visiting research physician at UCLA. Dr. Lellouche testified that claimant has the most serious form of Tretalogy of Fallot and that the combination of claimant's medical conditions cause claimant to be in a constant state of serious illness with severe symptoms. Dr. Lellouche opined that claimant requires constant care by properly trained health professionals. Since Dr. Lellouche is not familiar with the scope of practice for nurses in California, he did not offer an opinion as to whether claimant is in need of RN care as opposed to LVN care.

16. Anthony Ripaldi, R.N., is one of the registered nurse care givers for claimant. Although Medi-Cal has reduced the level of care from RN to LVN, Mr. Ripaldi continues to provide nursing care for claimant at the reduced LVN rate. Mr. Ripaldi has observed

[5] An intubation is the insertion of a tube into a body canal such as the trachea. An endotracheal intubation is performed to maintain the airway, ventilate the lungs, or to aspirate secretions.

claimant's oxygen saturation level fall below 75% on occasion. In those situations, Mr. Ripaldi usually changes claimant's body position or he might administer oxygen which usually raises the saturation level. Mr. Ripaldi testified that approximately 18 months ago, claimant's oxygen saturation levels fell to the 60s during a time that she was ill with a respiratory problem. Claimants was treated with antibiotics and placed on oxygen, which stabilized her condition.

DISCUSSION

17. Claimant's parents testified eloquently regarding claimant's condition and of her constant need for care. In support of claimant's position, her parents submitted letters from claimant's cardiologist, Dr. David A. Ferry, and her treating physician, Dr. Peter Waldstein, both of whom recommended RN care for claimant. Dr. Ferry's letter is dated November 16, 2004, and would not take into account that claimant has been clinically stable since that time. Dr. Waldstein's letter, dated March 31, 2006, generally states claimant's condition but does not give a specific clinical reason for his RN recommendation. For example, Dr Waldstein does not identify which duties in the plan of care cannot be performed by an LVN. Dr. Waldstein letter was also inconsistent with exhibit 12, which is a faxed record from Dr. Waldstein's office indicating that claimant had visited his office only once in the past year (March 30, 2006), and that claimant's condition was "status quo; cardiac status – stable." Dr. Waldstein did not testify at the hearing to address this inconsistency, or to clarify his opinion regarding claimant's condition, or to specifically state his reasons for his recommendation.

18. Claimant's parents asserted that the nursing records presented by FDLRC were incomplete and did not show a true picture of claimant's condition. However, claimant's parents did not submit any medical or nursing records that rebutted the testimony or the records produced by FDLRC. Claimant's parents had the right to obtain copies of any and all medical and nursing records and introduce them into the record.

19. Clearly, claimant's condition is very serious but she is stable, and has been stable for at two or three years. However, the evidence also established that claimant's oxygen saturation levels can fall to into the 60s if she gets pneumonia, flu or other serious respiratory ailment. Under those circumstances, Dr. Richard agreed that RN care would be required.

LEGAL CONCLUSIONS

1. The Lanterman Act requires regional centers, as the agents of the state, to provide developmentally disabled people with those services and supports that will allow them, "regardless of age or degree of disability, and at each state of life" to integrate "into the mainstream life of the community" and to "approximate the pattern of everyday living available to people without disabilities of the same age". (Welf. & Inst. Code § 4500 et seq.)

2. Welfare and Institutions Code section 4646, subdivision (a), states "It is the intent of the legislature that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent and productive normal lives, and stable and healthy environments. It is further the intent of the legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer and reflect the cost effective use of public resources." In this case, the evidence established that an LVN can perform all of the tasks delineated in the plan of care when claimant's condition is clinically stable. However, during times that claimant suffers from conditions such as pneumonia or flu that would further complicate her respiratory problems, the evidence established that it would be appropriate for claimant to receive RN care at the currently funded 10 hours a day.

3. Grounds exist to affirm the decision of FDLRC reducing the level of nursing care from RN level of care to the level of care that can be provided by an LVN. However, during times that claimant suffers from conditions such as pneumonia or flu that would further complicate her respiratory problems, claimant should receive RN level of care for the currently funded 10 hours a day.

ORDER

The decision of FDLRC reducing the level of nursing care from that of registered nurse to that of LVN level of care is affirmed. Claimant's appeal is denied. If, however, claimant is diagnosed with a condition that complicates her respiratory system such as pneumonia or flu, and where it is documented that such condition has consistently reduced claimant's oxygen saturation levels below 75%, claimant shall receive funding from FDLRC for temporary RN level of care at ten hours per day. To receive the temporary RN level of care, Claimant's parents shall provide a copy of the above referenced diagnosis along with supporting nurse's notes or equivalent documentation to FDLRC.

Dated: May 8, 2006

HUMBERTO FLORES
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.